314 U.S.
5
JUL 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 292.

CHARLES A. BAHR, SR., AND GEORGE HAMMAN, Executors of the Estate of Eugene L. Bender, Deceased, *Petitioners,*

v

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM FULTON TARVER,
MILTON K. ECKERT,
JOHN C. WHITE,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	5
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	12
Appendix	13

CITATIONS.

CASES:

Blair v. Commissioner, 300 U. S. 5	10
Burnet v. Harmel, 287 U. S. 103	10, 11
Crooks v. Harrelson, 282 U. S. 55	8, 10
Helvering v. Bliss, 293 U. S. 144	9
Helvering v. Hammel, 85 Law. Ed. Adv. Op. 295, No. 49, October Term, 1940, decided Jan. 6, 1941	9
Morgan v. Commissioner, 309 U. S. 78	11
Poe v. Seaborn, 282 U. S. 101	10

STATUTES:

Revenue Act of 1926, c. 27, 44 Stat. 70, 72	
Sec. 302(a) (As amended by Revenue Act of 1934, c. 277, Section 404, 48 Stat. 754)	2
Sec. 303(a) (As amended by Revenue Act of 1934, c. 277, Section 403(a), 48 Stat. 753)	3
Sec. 303(a)(1) (As amended by Revenue Act of 1932, c. 209, Section 805, 47 Stat. 280)	3
Sec. 303(a)(2) (As amended by Revenue Act of 1932, c. 209, Section 806(a), 47 Stat. 281, and Revenue Act of 1934, c. 277, Section 402, 48 Stat. 753)	4

MISCELLANEOUS:

Paul, Randolph E., Selected Studies in Federal Taxation, the effect of Federal Taxation on Local Rules of Property (Second Series, Callaghan and Company, Chicago, 1938)	10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ——.

CHARLES A. BAHR, SR., AND GEORGE HAMMAN, Executors of the Estate of Eugene L. Bender, Deceased, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioners pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit (Hutcheson, J., dissenting) entered in the above entitled cause on April 22, 1941, affirming the decision of the United States Board of Tax Appeals, although the Circuit Court opinion finds inadequate the opinion of the Board and substitutes an altogether different rationale of the case.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 40) is reported in 41 B. T. A. 80. The opinion of the Circuit Court of Appeals (R. 58) is reported in 119 Fed. (2d) 371.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on April 22, 1941 (R. 69). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether the gross estate of decedent Eugene L. Bender, the sole heir and legatee of his brother and partner, Frank V. Bender, who died less than nine months before the death of the former, should include the gross estate received from the latter, or should include only a net interest therein for federal estate tax purposes.

2. Whether the plain language of Section 303 (a) (2) of the Revenue Act of 1926, as amended, requires use of the gross estate including the gross estate received from the prior decedent in the equation used to compute the deduction for property previously taxed or whether the lower courts can properly substitute in such equation the net interest in the assets received from the prior decedent.

STATUTES INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 70, 72.

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—(As amended by Revenue Act of 1934, c. 277, Section 404, 48 Stat. 754)

(a) To the extent of the interest therein of the decedent at the time of his death;

Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate— (As amended by Revenue Act of 1934, c. 277, Section 403 (a), 48 Stat. 753)

(1) Such amounts—

(A) for funeral expenses,

(B) for administration expenses,

(C) for claims against the estate,

(D) for unpaid mortgages upon, or any indebtedness in respect to, property where the value of decedent's interest therein undiminished by such mortgage or indebtedness, is included in the value of the gross estate, and

(E) reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes. The deduction herein allowed in the case of claims against the estate unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. There shall also be deducted losses incurred during the settlement of estates arising from fires, storms, ship wrecks, or other casualties, or from theft, when such losses are not compensated for by insurance or otherwise, and if at the time of the filing of the return such losses have not been claimed as a deduction for income tax purposes in an income tax return. (As amended by Revenue Act of 1932, c. 209, Section 805, 47 Stat. 280)

(2) An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (B) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax imposed under the Revenue Act of 1932, or an estate tax imposed under this or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this paragraph in respect of the property or property given in exchange therefor. Where a deduction was allowed of any mortgage or other lien in determining the gift tax, or the estate tax of the prior decedent, which was paid in whole or in part prior to the decedent's death, then the deduction allowable under this paragraph shall be reduced by the amount so paid. The deduction allowable under this paragraph shall be reduced by an amount which bears the same ratio to the amounts allowed as deductions under paragraphs (1), (3), and (4) of this subdivision as the amount otherwise deductible under this paragraph bears to the value of the decedent's gross estate. Where the property referred to in this paragraph consists of two or more items the aggregate value of such items shall be used for the purpose of computing the deduction. (As amended by Revenue Act of 1932, c. 209, Section 806 (a), 47 Stat. 281, and Revenue Act of 1934, c. 277, Section 402, 48 Stat. 753.)

STATEMENT.

The stipulation of facts (R. 17-40) was adopted by the Board as its findings of fact; they are substantially as follows:

Frank V. Bender and his brother, Eugene L. Bender, from 1906 until the death of the former composed a common law universal partnership in which each had equal interests; everything owned by either or both of them was partnership property. (R. 18)

Frank V. Bender died testate on March 18, 1934 leaving all his property after the deduction of the community interest of his wife, to his brother, Eugene L. Bender. (R. 17, 19) His will directed that the latter be independent executor without bond or security of any kind and that no court proceedings be had with respect to same except the filing of the will for probate and return of inventory and appraisement as required by law. (R. 37-38)

The will of Frank V. Bender was probated in the Probate Court of Harris County, Texas, on April 10, 1934, the inventory and appraisement was duly filed on April 23, 1934, and the costs of the proceeding were paid by the executor. (R. 17-18) The decree of said court in probating the will specifically recognized the provisions as to the independent executorship and ordered that the estate be dropped from the docket upon the return of the inventory and appraisement and payment of costs. (R. 40)

An estate tax return for the Estate of Frank V. Bender was filed with the Commissioner and inheritance tax return was filed with authorities of the State of Texas, and subsequently petitioners herein paid the federal estate taxes and the inheritance taxes to the State of Texas owing on the Estate of Frank V. Bender. (R. 19, 26)

The value of the gross estate of Frank V. Bender as determined by Commissioner was $913,147.40 with deductions exclusive of specific exemptions in the sum of $150,650.29, of which sum $112,062.50 constituted the share of the Estate of Frank V. Bender in partnership obligations of $448,250.00,

secured notes comprising $402,000 of this item and of which sum $15,762.66 constituted the share of said Estate in taxes owing the State of Texas and subdivisions thereof. (R. 18, 20-21)

Eugene L. Bender died testate on December 1, 1934, appointing petitioners herein as executors and trustees of his estate. (R. 17, 34) At the time of the death of Eugene L. Bender the value of partnership properties which passed under the will of Frank V. Bender to Eugene L. Bender was $880,597.48. (R. 22-23)

In the interim between the deaths of Frank V. Bender and Eugene L. Bender, the share of payments made on partnership mortgages and liens attributable to the Estate of Frank V. Bender was $11,686.78. (R. 25) At the time of the death of Eugene L. Bender secured partnership debts in the amount of $406,000 were still outstanding and taxes on partnership property were owing in the amount of $15,812.03. (R. 25)

The Commissioner determined the gross estate of Eugene L. Bender included only the net value of his interest in the estate of Frank V. Bender, with secured debts applying against the gross estate of the latter received by the former excluded in the computation of the net estate of Eugene L. Bender, and compared the net value of the estate of Frank V. Bender with gross estate of Eugene L. Bender in the ratio by which the deduction for property previously taxed was determined. (R. 12-15)

The Board of Tax Appeals upheld the Commissioner's determination, and the petitioners appealed to the Circuit Court of Appeals which affirmed the result of the Board's decision, but which departed widely from the Board's reasoning. (See dissenting opinion of Hutcheson, J., R. 63, 67)

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the gross estate of Eugene L. Bender included only a net interest in the gross estate of Frank V. Bender with secured debts applying against the gross

estate received through the latter automatically excluded in the computation of the net estate of the former.

2. In failing to hold that the gross estate of Eugene L. Bender included the gross estate of Frank V. Bender with secured debts applicable against the latter proper deductions in the computation of the former's net estate.

3. In holding that the deduction for property previously taxed was properly calculated by a method involving the comparison of the net amount of the Estate of Frank V. Bender with the gross estate of Eugene L. Bender including only above mentioned net amount in the formula by which said deduction is derived.

4. In failing to hold that the deduction for property previously taxed should be determined by comparing the gross estate of Frank V. Bender with the gross estate of Eugene L. Bender, including the gross estate of the former, in the formula by which said deduction is calculated and that the statute demands such an application of this formula.

5. In affirming the decision of the Board of Tax Appeals.

6. In failing to reverse the order of the Board and remand the cause for redetermination.

REASONS FOR GRANTING THE WRIT.

1. The methods of construction of a tax statute voiced in the opinion of the Circuit Court of Appeals are in conflict with applicable decisions of the Supreme Court.

a. The Circuit Court of Appeals construed Section 303(a)(2) of the Revenue Act of 1926, as amended, as permitting the deduction of secured debts from the gross asset value of inherited property prior to the inclusion of the latter in the gross estate of the decedent, and the comparison of the net inherited interest with the gross estate thus limited in the statutory formula for deriving the measure of the deduction for property previously taxed. In its inter-

pretation of this deduction from the value of a gross estate for federal estate tax purposes, the admitted objective of which is to prevent a double estate or gift tax on the same property within five years, the Circuit Court reads into the language of Section 303(a)(2), as amended, an adaption to "particular pieces of property specifically given or inherited". The plain words of the statute indicate no such limited scope. Furthermore, from that narrow viewpoint, the Circuit Court opinion reads into the amended section above-mentioned a limitation "which Congress has by amending it, taken out of it" (See opinion of Hutcheson, J., dissenting, R. 67), and forces a net interest theory upon an equation clearly demanding the comparison of gross interests.

Such a restricted view of the statute is in no way justified either by the legislative history of the provision, the regulations of the Treasury Department, or the construction of other courts. The refusal of the Circuit Court to follow the plain and direct words of the statute is in pointed contradistinction to the thought of the Supreme Court expressed in *Crooks* v. *Harrelson*, 282 U. S. 55, 61, on the subject of statutory interpretation:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

The dissenting Judge below called attention to this violation of the rules of statutory construction in the opinion of the Circuit Court which "does as complete violence to the terms of the statute as that the Board puts forward" and expressed the rule approved by the Supreme Court as follows (R. 67):

> "Where the words of a taxing act have a sensible meaning they are controlling. They must be followed rather than a supposed intent not expressed in them. 'Courts and administrative agencies are bound to enforce the plain words of a statute, although there may

> be reason to think in view of the general legislative purpose that some other provision would have met with favor if the legislature had called it to mind.' *Commissioner of Internal Revenue* v. *Windrow*, 89 Fed. (2d) 69."

No more recent expression of the opinion of the Supreme Court on the subject of statutory interpretation from which the Circuit Court departs could be found than in *Helvering* v. *Hammel*, 85 Law Ed. Adv. Op. 295, No. 49, October Term, 1940, decided January 6, 1941, wherein it is declared:

> "True, courts in the interpretation of a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results, *United States* v. *Katz*, 271 U. S. 354, 362, 70 L. ed. 986, 990, 46 S. Ct. 513, or would thwart the obvious purpose of the statute, *Haggar Co.* v. *Helvering*, 308 U. S. 389, 84 L. ed. 340, 60 S. Ct. 337. But courts are not free to reject that meaning where no such consequences follow and where, as here, it appears to be consonant with the purposes of the Act as declared by Congress and plainly disclosed by its structure."

Clearly the Circuit Court was not "free to reject" the literal meaning of Section 303(a)(2), as amended, in this case and in doing so prepared a conflicting opinion with the thought of the Supreme Court.

Moreover, the deduction for property previously taxed was established as a matter of public policy to prevent double taxation. The extent and scope of a deduction of this type is not to be infringed upon by a constricting interpretation. So the Supreme Court has specified in the following language from the opinion in *Helvering* v. *Bliss*, 293 U. S. 144, 150:

> "If the meaning of the Act were doubtful, we should still reach the same conclusion. The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed."

The action of the Circuit Court in confining the deduction for property previously taxed to limited bounds is contrary to the accepted rule of the Supreme Court. It must not be overlooked that while Section 303(a)(2), as amended, authorizes a deduction from a gross estate under certain circumstances, no one has contested or could contest the right of the estate of the decedent herein to the deduction. The controversy relates solely to the quantum of the deduction and on that simple and mathematical point there is all the more reason for a literal construction of the statute in accordance with the decisions of the Supreme Court.

b. The refusal of the Circuit Court of Appeals to concede appropriate effect to a Texas law of property affecting the quantum of a gross estate, Art. 3314, Revised Civil Statutes of Texas (1925), the pertinent portion of which is set out in the Appendix, *infra*, is in direct conflict with the views of this court expressed in *Poe* v. *Seaborn*, 282 U. S. 101; *Crooks* v. *Harrelson*, 282 U. S. 55; and *Blair* v. *Commissioner*, 300 U. S. 5, and other opinions. In those cases, state rules of property were observed in the administration of federal taxing acts, and no less effect should be accorded the above-mentioned Texas statute in its declaration that legal title to inherited property vests in the heir as of the date of death of the testator.

In estate tax matters, the local rules of property are peculiar and singularly controlling.[1] Paying its respects to the "myth"[2] of uniformity in the administration of federal taxes, the Circuit Court accepts the case of *Burnet* v. *Harmel*, 287 U. S. 103, as blanketing out the effect of local laws "unless the statute refers to them as a standard". In the

---

[1] "The law of each state still, it is true, determines the quantum or quality of the decedent's interest in the property involved; * * *" Randolph E. Paul, Selected Studies in Federal Taxation, The Effect of Federal Taxation on Local Rules of Property, p. 21 (Second Series, Callaghan and Company, Chicago, 1938.)

[2] Ibid., p. 5.

first place, the *Burnet* case involved a problem[3] wholly different from that in the instant case where the extent of the decedent's property interest in the evaluation of his gross estate is in issue. Secondly, the opinion in the *Burnet* case does not rule out the effect of state statutes except where express reference is made to them as a standard since it also declares the operation of the federal taxing act may be controlled by the local law in cases of "necessary implication". Many parts of the federal estate tax law are expressly dependent upon state laws, as, for instance, items of deduction from gross estates under Section 303(a)(1). Moreover, the character of the interest of the decedent in property is so peculiarly within the province of the local rules of property that Section 302(a) in defining the value of a gross estate simply provides for the inclusion of the value of all property "To the extent of the interest of the decedent at the time of his death". No standard is specified for the determination of these "interests", which by necessary implication must be determined by state law. In *Morgan* v. *Commissioner*, 309 U. S. 78, 80, it is stated:

> "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created shall be taxed".

Consequently, the Circuit Court slipped into a conflict with applicable decisions of this Court when it discarded the complete interest which the present decedent had under Texas law in the prior estate and supplied an artificial net interest not specified or demanded by the federal taxing act.

2. There is involved an important question of the construction of a federal statute which has not been before this Court and should be settled by it. The deduction for "property previously taxed" is a significant part of the federal

---

[3] "The question at isue, in other words, was not the nature of the property interest possessed by the parties, but simply whether the transaction, though characterized as a sale by state law, was the sort of transaction which Congress had intended to tax as a capital gain." Ibid., p. 33, n. 73.

estate tax law, and in view of the public policy behind its enactment is fully deserving of the consideration of the Supreme Court. Moreover, the amendment of Section 303 (a) (2) of the Revenue Act of 1926 by Section 806 (a) of the Revenue Act of 1932 raises an exceedingly delicate question of statutory interpretation (See dissenting opinion, below, R. 67), yet because of the relative infrequency of cases like this in the courts, a conflict of opinions below in the near future is improbable. The very fact that the Court below was divided, with a strong dissenting opinion, contributes to the reasons why the questions presented should be handled and settled by this Court to avoid administrative confusion and to permit taxpayers to know the proper interpretation of the law.

CONCLUSION.

It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

William Fulton Tarver,
Milton K. Eckert,
John C. White,
Counsel for Petitioners.

APPENDIX.

REVISED STATUTES OF TEXAS, 1925:

Article 3314. Transfer of Estate at Death.

When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject however to the payment of the debts of the testator or intestate, except such as may be exempted by law; and, whenever a person dies intestate, all of his estate shall vest immediately in his heirs at law, but with the exceptions aforesaid shall still be liable and subject in their hands to the payment of the debts of the intestate; but upon the issuance of letters testamentary or of administration upon any such estate, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, with the exceptions aforesaid; and he shall recover possession of and hold such estate in trust to be disposed of in accordance with law. (Vernon's Texas Civil Statutes, Vol. 9, Title 54, Art 3314, p. 384)